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Supreme Court of the United States,

OCTOBER TERM, 1953

No. 565

WALTER WILLIAMS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit
and
SUPPORTING BRIEF.

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OCTOBER TERM, 1953

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WALTER WILLIAMS,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Fifth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

May It Please the Court:

Your Petitioner shows unto this Honorable Court as follows:

1.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The petitioner, Walter Williams, was charged in an indictment on two counts along with one Tom Baker. In Count One of the indictment, petitioner and Baker were charged with conspiring with one James Thurmond Boatwright and one Roy L. Tanksley (sailors stationed at Naval Air Station, Pensacola, Florida, who were named co-conspirators but not made defendants in this case) (a) to steal one airplane propeller of the United States of the value of more than One Hundred Dollars ($100.00), and (b) to receive, conceal and retain with intent to convert to their (appellant's and Baker's) own use property of the value of more than One Hundred Dollars, to-wit one airplane propeller when the appellant and Baker well knew that the propeller had been stolen.

In Count Two of the indictment petitioner and Baker were charged with the substantive offense of receiving, concealing and retaining with intent to convert to their own use and gain the propeller which is the object of the conspiracy in Count One of the indictment. Petitioner and Baker entered pleas of not guilty.

At the trial of the case the government's principal witnesses were Boatwright and Tanksley, the sailors who were admittedly self-confessed thieves who were then awaiting sentences on a charge of theft of government property.

Boatwright testified that petitioner, who was in the business of buying and selling aircraft parts, had sent word to

Tanksley that he was interested in buying some airplane parts. He further stated that he and Tanksley made two trips to appellant's place of business but that on neither trip was petitioner present. On the second of the two visits, Boatwright and Tanksley allegedly met Tom Baker, the manager of petitioner's business in Pensacola. On this occasion, Boatwright allegedly left a number by which appellant could reach him. Boatwright testified that on March 13, 1952, petitioner called him via telephone at Whiting Field and arrangements were made for Boatwright to meet petitioner at appellant's hotel room that night. Petitioner denied this in his testimony. Boatwright further testified that he went to petitioner's hotel room at the San Carlos Hotel that night and he and petitioner went down to the bar and petitioner wrote out on a napkin a list of parts he would like to get. Boatwright further stated that he informed petitioner that he could obtain only an airplane propeller and that petitioner promised to pay him Three Hundred Dollars for the propeller. Boatwright further testified that a few days later, Tanksley obtained the propeller by requisition and brought it to a place near Milton. Boatwright said that he, Baker, and Tanksley met at a restaurant near Milton and Tanksley led the other two to the spot where the propeller was. Baker placed the propeller in his car and drove away. Boatwright further stated that he and Tanksley were paid $300.00 for the propeller — $100.00 by Baker and $200.00 by petitioner. Boatwright further stated that on all occasions in which he had dealings with Baker or petitioner he and Tanksley were dressed in civilian attire.

Tanksley's testimony was basically similar to that of Boatwright except that he was the party who actually mis-

appropriated the propeller. Tanksley further stated that Boatwright conducted all discussions and negotiations with Baker and petitioner. Tanksley also admitted that on all occasions in which he came into contact with Baker or petitioner, he and Boatwright were dressed as civilians.

At the end of the Government's case, counsel for petitioner and Baker moved for a directed verdict of not guilty (judgment of acquittal). This motion on behalf of the two Defendants was based on the contention that the Government had utterly failed to prove by competent evidence that the defendants were guilty of the crimes with which they were charged and additionally, it was contended that if the defendants were guilty of any crime it was that of receiving government property knowing it to have been *"embezzled."* The motions for judgment of acquittal on behalf of the defendants were overruled and thereafter both Baker and petitioner took the stand in their own behalfs.

At the end of the entire case, counsel for petitioner and Baker renewed the motions for a directed verdict of not guilty (Tr. 144). Upon these motions being overruled by the Trial Judge, the said Trial Court gave the charge to the jury. In its charge to the jury the Trial Court instructed the jury on the definition of reasonable doubt as follows: (Tr. 145)

> "A reasonable doubt, Members of the Jury, means exactly what the term implies. A doubt that would appeal to a reasonable person, a doubt FOR WHICH YOU CAN GIVE YOURSELF A REASON — it does not mean an idle, whimsical or

fanciful doubt, but a real well founded doubt." (Emphasis Added)

Further, the Trial Judge in his charge to the jury referred to Boatwright and Tanksley eight times during the course and charge to the jury as "the sailor boys." After receiving the charge from the Court, the jury deliberated and returned a verdict of *not guilty* as to Baker and guilty as to petitioner. Thereupon petitioner prosecuted an appeal to the Fifth Circuit Court of Appeals. This Court affirmed the conviction of petitioner and denied an application for rehearing filed by petitioner whereupon petitioner timely applied for a Writ of Certiorari to this Honorable Court.

2.

BASIS FOR THIS COURT'S JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C.A. 1254.

3.

QUESTIONS PRESENTED

This petition involves the following questions:

1. Whether the Trial Judge committed an error patent on the face of the record when he instructed the jury that a reasonable doubt is one for which "you can give yourself a reason" and further, when it failed to give a full and complete definition of the meaning of "reasonable doubt."

2. Whether the indictment in the case at bar contains the requisite criminal intent necessary to constitute the offense for which petitioner is charged.

3. Whether the motion for directed verdicts of not guilty (judgment of acquittal) should have been sustained because of insufficient credible testimony in support of the Government's case.

4. Whether the motion for a directed verdict of acquittal should have been sustained as to Count 2 because the proof in this case proves that the propeller "was embezzled" and "not stolen" as charged in the indictment.

5. Whether the Trial Court committed prejudicial error patent on the face of the record in its charge to the jury by adopting a paternal attitude toward the Government witnesses, Boatwright and Tanksley, by continually referring to them as "sailor boys."

4.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Petitioner says that the decision of the Court of Appeals for the Fifth Circuit:

1. Erred in sustaining the charge of the Trial Court to the Jury that a reasonable doubt is one for which "you can give yourself a reason" since such a charge shifts the fundamental presumption of innocence and burden of proof in a criminal case and requires a defendant to provide a jury with a reason to find him innocent. There is

a divergence of opinion among the federal courts as to whether such a charge constitutes reversible error. This question has never been decided by this Honorable Court and it is of grave importance that this Court do so.

2. Erred in holding that the case of *MORRISSETTE VS. UNITED STATES*, 342 U. S. 246, 72 S. Ct. page 40, was inapplicable to the case at bar because the factual situation involved was different in the two cases. Counsel for Petitioner submits that the law enunciated in the Morrissette case is applicable to the instant case and that the indictment herein fails to contain all of the necessary elements necessary to constitute the offense since it does not sufficiently allege the necessary criminal intent.

3. Erred in holding that there was sufficient credible testimony in support of the Government's case against Appellant since the Government relied almost exclusively on the testimony of two self-confessed thieves and accomplices who were subjected to being placed in solitary confinement in dark cells and of these two alleged Government witnesses, one (Tanksley) admitted that he had neither seen, spoken to or communicated in any way with Appellant until after the completion of the transaction upon which Appellant was convicted (Tr. 44-60).

4. Erred in holding that the evidence in the case at bar proves that the airplane propeller was stolen and not embezzled as contended by Appellant.

5. Erred in sustaining the charge to the jury by the Trial Court. The Trial Court through its charge to the jury referred to Boatwright and Tanksley, who were self-

confessed thieves and accomplices and star Government witnesses, as "sailor boys." Such a paternal attitude on the part of the Court was very prejudicial to your petitioner and deprived him of a fair and impartial deliberation by the jury. The decision by the Court of Appeals for the Fifth Circuit failed to rectify this error.

WHEREFORE, it is respectfully prayed that this Petition be granted and that a Writ of Certiorari be issued and directed to the United States Court of Appeals for the Fifth Circuit commanding that Court to certify and send to this Court, for its review and determination, a full and complete transcript and records of all proceedings in the case numbered and entitled on its Docket No. 14,427, WALTER WILLIAMS, APPELLANT, VS. UNITED STATES OF AMERICA, APPELLEE, to the end that judgment and opinion of said Court of Appeals, and of the District Court, may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as may seem meet and just.

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The undersigned hereby certifies that he has served a copy of the foregoing petition upon the Solicitor General of the Department of Justice at Washington on the _____ day of _____, 1954.

_____
Attorney for Petitioner

BRIEF IN SUPPORT OF PETITION

1.

OPINION BELOW

The opinion of the United States Court of Appeals is attached to the original record filed herewith.

2.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254.

3.

STATEMENT OF THE CASE

The principal facts are set forth in the Petition "SUMMARY STATEMENT OF THE MATTERS INVOLED."

To avoid repetition the statement of the case there made is adopted.

4.

QUESTIONS PRESENTED

A statement of the questions presented is set forth in the Petition under "QUESTIONS PRESENTED."

To avoid repetition same is adopted.

5.

SPECIFICATIONS OF ERRORS

The Court of Appeals erred:

1. In holding that the charge of the Trial Court to the trial jury that a reasonable doubt is one "for which you can give yourself a reason" did not constitute reversible error.

2. In holding that the indictment in the case at bar contained all of the essential elements necessary to constitute the offense for which Appellant was charged and, more particularly, included the necessary criminal intent and the Court of Appeals further erred in holding that the case of *MORRISSETTE VS. UNITED STATES* was inapplicable because the factual situation involved was different in that case from the case at bar.

3. In holding that there was sufficient credible testimony in the Government's case to be submitted to the jury for its deliberation.

4. In holding that the evidence in the record in this case proved the propeller to be "stolen" and not "embezzled."

5. In holding that the Trial Judge did not commit reversible error by referring to the self-confessed thieves and accomplices and star Government witnesses, Boatwright and Tanksley, eight times during the course of his charge to the jury as "the sailor boys."

ARGUMENT

I

The Court of Appeals erred in holding that the charge to the jury by the Trial Court on reasonable doubt in which he stated that a reasonable doubt is one "for which you can give yourself a reason" did not constitute reversible error.

In his charge to the jury the trial judge defined a "reasonable doubt" as follows: (Tr. 145)

> "A reasonable doubt, Members of the Jury, means exactly what the term implies. A doubt that would appeal to a reasonable person, a doubt FOR WHICH YOU CAN GIVE YOURSELF A REASON—it does not mean an idle, whimsical or fanciful doubt, but a real well founded doubt."

Counsel for appellant contended that the above charge to the jury requiring a juror to be able to give himself a reason for a doubt shifted the burden of proof and destroyed the presumption of innocence. In regard to this contention the opinion of the Court of Appeals stated:

> "No objection was taken to any part of the charge notwithstanding the rule in federal courts that claimed trial errors should be specifically called to the attention of the trial judge so that he might have opportunity to rectify the mistake if he has made one. While it is true that we may notice plain error, we cannot on this record say that this charge

affected the fairness and integrity of this proceeding. *UNITED STATES V. FARINA,* 2 Cir., 184 F. 2d 18."

It is contended by Counsel for appellant that the trial court committed an error patent on the face of the record on giving such a charge and that such error can be noticed and reviewed by this Honorable Court. Rule 52 (b) of the Federal Rules of Criminal Procedure; *GOMILA V. UNITED STATES,* 146 F. 2d 372 (CCA 5, 1944); *LAMENTO V. UNITED STATES,* 4 F. 2d 901 (CCA 8); *BENSON V. UNITED STATES,* 112 F. 2d 422 (CCA 5); *BRASFIELD V. UNITED STATES,* 272 U. S. 448, 47 S. Ct. 135, 71 L. Ed. 345; *UNITED STATES V. ATKINSON* 297 U. S. 157, 56 S. Ct. 391, 80 L. Ed. 555.

The opinion of the Court of Appeals cited the case of *UNITED STATES V. FARINA,* 184 F. 2d. 18 (CCA 2, 1950). In this case the United States Court of Appeals for the Second Circuit had for consideration a charge to the jury on reasonable doubt in which the trial court stated that a reasonable doubt is one for which a juror "can give a reason for entertaining." Although this change was not objected to in the trial court it was considered at length on appeal. The Court of Appeals for the Second Circuit held by a two to one majority that the charge did not constitute reversible error. A very lengthy dissent was recorded by Judge Frank of the Second Circuit in which Judge Frank relied on the case of GOMILA VS. UNITED *STATES,* 146 F 2d, 72, decided by the Fifth Circuit Court of Appeals and other cases. Even the majority opinion in the case of *UNITED STATES V. FARINA, Supra,* admits:

"The criticism of the judge's statement that reasonable doubt is a doubt for which a person 'can give a reason for entertaining,' one which has long produced some divergence of opinion in the courts."

Judge Frank in his dissenting opinion stated: *(UNITED STATES V. FARINA, Supra* at pp. 23 and 24)

"The trial judge, far from curing his 'presumption of innocence' error by his comments on 'reasonable doubt,' aggravated that error when he told the jury that such a doubt is one which a juror 'can give a reason for entertaining.' This again was a matter to which the jurors probably paid close attention, since the important 'reasonable doubt' principle is also often popularly discussed out of court. The judge's definition of that principle, therefore, most probably impressed the jury.

Now this very sort of instruction was severely criticized, and made the basis of reversals, by Judge Walter H. Sanborn of the Eighth Circuit. He, one of our greatest judges, was no soft 'sentimentalist,' eager to absolve criminals, but he was sensitive to the possible tragic impact on men's civil liberties of verdicts due to carelessly phrased statements by trial judges to juries. As he pointed out, the instruction he condemned means that the jurors must not consider any doubt about guilt unless they can articulate, at least to themselves, a sound 'reason' for doing so.

Our own judicial experience teaches that sometimes even trial judges have difficulty in rationally explaining the grounds of their decisions. Some trial judges resent any obligation in jury-less cases, where the oral testimony is conflicting, to go beyond publishing laconic, unexplained, judgments, they even object to filing special findings of fact. Some of those judges complain that the formulation of fact-findings is too arduous and, more bound to be artificial. I share the view that, on net-balance, that complaint is unjustified. There would be more justification for complaint, if a trial judge were required to reveal, or even to disclose that he himself knew, the 'reasons' for his special findings. But there is no such requirement.

Surely, then, we ought not ask a juror, who has nothing like a trial judge's experience and training, not merely to find facts but also to be able to recognize, and to make explicit to himself or the other jurors, the 'reason' for joining in a finding of fact or for any intermediate step in his mental processes. Mr. Justice Holmes, speaking for the Supreme Court, said the reasoning of an administrative body need not be thus articulate, since its decision expresses 'an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions * * * which may lie beneath consciousness without losing their worth.' We should not exact more of a jury. Accordingly I think the jurors were badly misinstructed when told they must ignore any doubt which they could 'give no reason for entertaining.'

My colleagues assume, in effect, that the jurors construed that instruction as would an intelligent law student or lawyer, well-versed in the traditional meaning of 'reasonable doubt.' I cannot go along with that assumption. Far more probably, the jurors thought the judge meant just what he said. One can, then, well imagine that one of the jurors, when in the jury-room, impressively remarked to his fellow-jurors: 'Remember that the judge especially warned us we must discard any doubt about guilt unless we can 'give a reason for holding it.' So it seems to me not at all improbable that the jurors, acting under this erroneous instruction, and incapable of formulating a rational explanation of a doubt they entertained, concluded that they had the duty to discard a doubt which, had they been properly instructed, would legitimately have yielded an acquittal. The defendants ought not bear the risk that the verdict derived from such an error.

I should add that the decisions cited by my colleagues, of this court and of the Ninth Circuit, which (in whole or in part) disagreed with Judge Sanborn's ruling, were written when previous to *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, those courts were misinterpreting the 'harmless error' doctrine. The evidence in the present case does not suffice to render the errors 'harmless' within the Kotteakos case. For it cannot be said, from merely reading the printed record, that the defendants are so unmistakably guilty that the jury would have been un-

> reasonable if, guided by proper instructions, it had found them innocent."

In the case at Bar the opinion by the Court of Appeals brushed off appellant's contention by stating that no objection was taken in the trial court by counsel for appellant. In the opinion upon which that court relied on i. e. *UNITED STATES V. FARINA, Supra,* no objection was made in the trial court but the Court considered the matter so serious that it discussed the matter at length in its opinion. In the case at Bar the appellant was given a two-year prison sentence and a $1000.00 fine for allegedly conspiring to steal a $300.00 government propeller. The Second Circuit Court of Appeals considered this question of law to be a very grave one and counsel for appellant submits that the matter is one which should be considered whether or not an objection was made in the trial court.

Even the majority opinion in the case of *UNITED STATES VS. FARINA, Supra* admitted:

> "The criticism of the judge's statement that reasonable doubt is a doubt for which a person 'can give a reason for entertaining,' one which has long produced some divergence of opinion in the court."

In the case of *OWENS V. UNITED STATES,* 130 F. 283, 64 CCA 529 (1904), the Court held in regard to such a charge, to-wit:

> "A doubt arising out of evidence is a mental operation for which it may often be difficult, and,

> indeed, impossible, to assign any reason, and yet, if honestly entertained by the jury in a criminal case, must be acted upon, for they are only authorized to bring in a verdict of guilty when satisfied and convinced beyond a reasonable doubt of the accused."

Similarly, in the case of *PETTINE V. TERRITORY OF NEW MEXICO,* 201 F. 489 (CCA 8, 1912) the Court instructed the jury that — "a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case." The court held this to be reversible error and stated on Page 496 of the opinion:

> "In a criminal case the presumption of innocence accompanies the defendant throughout the trial. The burden is on the government to over come this presumption, to produce evidence that will satisfy the minds of the jury beyond a reasonable doubt of the guilt of the accused. The burden is upon the prosecution to furnish to the jury by the evidence it produces, sound reasons that shall produce and maintain in their minds an abiding conviction of his guilt to a moral certainty. Now to say that a doubt of the built of an accused person which a juror may indulge is not a reasonable doubt unless he can give a reason for it based on the evidence or want of it is to reverse this established rule, and to put upon the accused the burden of furnishing the jury with a reason for his acquittal; for, if a juror must give a reason for his doubt, he must give a sound reason, or this new rule is idle and ineffective. If no juror who

has a doubt of the guilt of the accused may lawfully vote for his acquittal unless he can give a sound reason for his doubt based on the evidence or want of it, the question immediately arises whether this reason must be sound in his own opinion only, or in the opinion of his fellow jurors, or of the judge, and, once adopted this rule and instructions on the subject must inevitably multiply and add dialectics and confusion to the rule and its application. The ability to give sound reasons for their doubts or their beliefs is not given to many men, and every prudent and thoughtful man at once recognizes the fact that in the graver and more important affairs of his own life doubts for which he can formulate no convincing reason often induce him to act or to refuse to act. To require every person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the testimony for his doubt of his guilt before he may vote for his acquittal places too heavy a burden on the accused. It destroys the rule of reasonable doubt, and substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or the want of it. The court below was in error when it placed this heavy burden upon the defendant, and charged the jury that a reasonable doubt was one for which a reason could be given founded on the evidence or want of it."

Counsel for appellant contends that the reasoning of the Pettine case is sound and that a charge to the jury which defines a "reasonable doubt" to be one for which

a reason can be assigned places an onerous burden on the defendant in a criminal case and is repugnant to the traditional presumption of innocence which protects even the worst culprit in this country. IT PLACES UPON A DEFENDANT IN A CRIMINAL PROCEEDING THE NECESSITY OF FURNISHING TO THE JURY A SOUND REASON TO DOUBT THE DEFENDANT'S GUILT. Such a principle is not now, nor has it ever been an accurate statement of law of a defendant's position in a criminal proceeding.

The burden is clearly placed upon the prosecution to prove the defendant's guilt beyond a reasonable doubt. There is no burden placed upon a defendant of proving to the jury that there is a sound reason why he should be acquitted.

It is submitted that this question of law is res novo in this Court and that there long has been a divergence of opinion in the Federal Courts on said question of law, that this Honorable Court should pass upon it and it is firmly believed by counsel for Appellant that this Honorable Court will hold that such a charge deprives the accused of the basic presumption of innocence guaranteed him by our constitution and courts and that your petitioner is entitled to a new trial.

II

The decision of the Appeals Court is in conflict with that of *MORRISSETTE VS. UNITED STATES*, 342 U.S. 246, 72 S. Ct. 240.

The indictment returned against Appellant in the case at bar is set out on pp. 1 through 5 of the record.

The opinion of the Court of Appeals erred in holding the law enunciated in the case of *MORRISSETTE VS. UNITED STATES,* 342, U. S. 246, 72 S. Ct. 240 to be inapplicable because the factual situation involved was different in the two cases. Counsel for Appellant admits that the facts of the Morrissette case are not parallel to those of the case at bar, but contends most strenuously that the law enunciated in the Morrissette case renders invalid the indictment of the instant case. In the Morrissette case, the Court stated in footnote 30 of the opinion (96 L. Ed. 288 at page 304):

> "HAD THE INDICTMENT BEEN LIMITED TO A CHARGE IN THE WORDS OF THE STATUTE, IT WOULD HAVE BEEN DEFECTIVE IF, IN THE LIGHT OF THE COMMON LAW, THE STATUTE ITSELF FAILED TO SET FORTH EXPRESSLY, FULLY AND CLEARLY ALL ELEMENTS NECESSARY TO CONSTITUTE THE OFFENSE. *UNITED STATES V. CARLL,* 105 U. S. 611, 26 L. Ed. 1135."

In the case at bar, the government, in drafting the indictment, did exactly what the United States Supreme Court said it should not do, in that it limited the indictment to a charge in the words of the statute which failed to set forth expressly, fully and clearly all elements necessary to constitute the offense. The only manner in which the instant indictment varied from the wording of the statute is that the word "unlawfully" was placed before

the words "steal, purloin and knowingly convert", etc. It is well settled that to charge that a party did something unlawfully" is a conclusion which means nothing more than alleged contrary to law. *BANNON V. U.S.*, 156 U. S. 464, 15 S. Ct. 467, 39 L. Ed. 494; *DAVIS V. UTAH*, 151 U. S. 262, 14 S. Ct. 328, 38, L. Ed. 153; *UNITED STATES V. SCHNEIDERMAN*, 102 F. Supp. 87.

It is true that where a conspiracy to commit an offense is charged, the conspiracy is the gist of the crime, and certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required in stating the object of the conspiracy. *WILLIAMSON V. U. S.* 207 U. S. 447, 28 S. Ct. 171; *WONG TAI V. U. S.* 273 U. S. 81, 47 S. Ct. 300. However, in the case at bar the government chose to "descent to particulars" and allege in the language of the statute the means — both act and intent — whereby the alleged conspirators purported to commit offenses against the United States. See *U. S. V. CRUIKSHANK*, U. S. 558, 23 L. Ed. 588, *UNITED STATES V. SCHNEIDERMAN, SUPRA.*

It is submitted that the case of *MORRISSETTE V. UNITED STATES, supra*, makes mandatory allegations of criminal intent which are found wanting in the case at bar, and that, therefore, the indictment in the instant case is invalid.

III

The Court of Appeals erred in holding that the Trial Court was correct in overruling Appellant's motion for a directed verdict of not guilty (judgment of acquittal) since

there was insufficient credible testimony in support of the Government's case against Appellant.

It is a fundamental principal of law that where there is want of sufficient evidence to sustain a conviction, the conviction should be reversed. *WOMBLE V. U. S.*, 324 U.S. 830, 65 S. Ct., 1022, 89 L. Ed. 1397 (1944).

In the prosecution of this case against appellant, the Government relied solely on the testimony of two self confessed thieves and accomplices — Boatwright and Tanksley. An examination of the transcript of testimony of Tanksley (Tr. 44-60) readily discloses that Tanksley admittedly had nothing to do with any alleged negotiations with Appellant but that all alleged negotiations were between Boatwright and Appellant. On page 46 of the transcript is to be found:

"Q. Well now, when you got that propeller what did you do with it?
A. I carried it to this wooded area near Milton.

Q. Why did you carry it to the wooded area?
A. To leave it to sell to Mr. Williams.

Q. To leave it to sell to Mr. Williams.
A. Yes.

Q. WHO DID YOU HAVE ANY DEALINGS WITH IN CONNECTION WITH THAT TRANSACTION?
A. MR. BOATWRIGHT." (Emphasis Added)

Tanksley testified that he went out to appellant's place of business twice, looking for appellant and mentions that he met Baker on one of those occasions but, never once mentioned Appellant. (Tr. 54). This is corroborated by Boatwright's testimony that on the two visits of Boatwright and Tanksley to Appellant's place of business, Appellant was not there. (Tr. 21 and 22). Tanksley further testified that on the date he misappropriated the propeller, he met Boatwright and Tom Baker at a restaurant in Milton, Florida. (Tr. 47). Again, Appellant was not there. Tanksley did testify (Tr. 50) that sometime after the misappropriation and delivery of this propeller, he met Appellant and saw Appellant give a two hundred dollar check to Baker who was to cash the check and give it to Boatwright and Tanksley as the final payment on the propeller. There was nothing in this testimony in conflict with Appellant's denial that he knew the propeller was stolen.

THUS, THE ONLY TIME TANKSLEY EVER SAW APPELLANT OR EVEN SPOKE TO APPELLANT WAS SOMETIME AFTER THIS TRANSACTION WAS COMPLETED. THERE IS NOT A SCINTILLA OF EVIDENCE IN TANKSLEY'S TESTIMONY TO IMPLICATE APPELLANT WITH THIS OFFENSE.

The only other Government witness who testified as to Appellant's alleged part in this alleged conspiracy was James T. Boatwright. The government relied almost exclusively on this self-confessed thief and accomplice to convict Appellant.

Let's make an examination of Boatwright's motives for testifying in behalf of the Government in this case. First

of all, he and Tanksley were indicted for the theft of this propeller, and pleaded guilty in November, 1952 (Tr. 19 and 20). Boatwright and Tanksley were supposed to be sentenced at the end of the case against Appellant (Tr. 20). Thus, at the time of the trial of this case, Boatwright and Tanksley were awaiting sentence. Counsel for Appellant submits that Boatwright was so anxious to convict Appellant in order to save his own neck that many of his answers were not responsive to the question asked by the Government prosecutor. IN PASSING, IT MIGHT BE WELL TO STATE THAT BOATWRIGHT AND TANKSLEY HAVE NOT BEEN SENTENCED TO THIS DATE AND ARE NOW SCHEDULED TO BE SENTENCED AFTER A RETRIAL OF A COMPANION CASE IN FEBRUARY, 1954.

The second basic reason for Boatwright and Tanksley being so anxious to convict Appellant is that they were in the Navy and anxious to avoid trouble with that branch of the service.

On page 39, Boatwright testified as follows:

"Q. How long have you been in the Navy?
A. Ten years.

Q. You expect to make a career of it?
A. I hope to."

Boatwright and Tanksley were indeed aware of the long arm of military justice hanging over their necks in addition to that of the civil authorities. It is no wonder

that they could hardly wait to shout to the jury that appellant was guilty.

The third reason which motivated Boatwright's and Tanksley's testimony against appellant in this case is that they were subjected to such treatment as to force anyone to testify to anything. Although Boatwright and Tanksley were very careful to protect the Navy investigating authorities in their testimony, it is obvious that a great deal of pressure was put on them.

Boatwright testified as follows: (Tr. 37-39)

"Q. When were you arrested?
A. The 1st of July.

Q. Who arrested you?
A. The station police.

Q. Naval Air Station police?
A. Yes, sir.

Q. Did they have a warrant out for you then?
A. I didn't ask them.

Q. You didn't ask?
A. I didn't ask, they said come along and I went along.

Q. Where did they take you?
A. Mainside, over here.

Q. How long did you stay there?
A. Twenty-three days.

Q. Were you in solitary confinement?
A. No, sir.

Q. You were not?
A. Not solitary confinement.

Q. What kind of confinement were you in?
A. Well, for a few days there I was in a dark cell, but then they put me out with the other prisoners after seven days.

Q. After how many days?
A. After seven days.

Q. Then you remained in a dark cell for seven days.
A. Yes, sir.

Q. What kind of food did you get?
A. Regular food that the whole crew ate.

Q. Good food?
A. Yes, sir.

Q. Did they take you out each day or leave you in there?
A. They would take me out each day for a little exercise.

Q. Did they subject you to any questioning dur-

ing those seven days you were in solitary confinement?

A. Once and awhile they would question me — made out statements, etc.

Q. What do you mean "once and awhile"?

A. Well, I made out several statements while I was in there.

Q. While you were in the dark cell?

A. Yes, sir.

Q. After you finished making the statements did they let you out?

A. Oh, yes. I made other statements after then too.

Q. Did you stay in solitary confinement until a preliminary hearing in the office for Tom Baker?

A. I was never in solitary confinement.

Q. Who else was with you in the dark cell?

A. I was in seven days and Tanksley was in three days.

Q. Were you by yourself?

A. Yes.

Q. Did you appear at a preliminary hearing against Tom Baker?

A. Yes, sir.

Q. Did you remain in the brig until that time?
A. Yes, until they told us we could make bond — after we made bond they moved us.

Q. After that hearing you were granted your freedom?
A. Yes, sir.

Q. Since then have you been on duty at the Naval Air Station?
A. Yes, sir.

Q. Have you had approximately the same freedom that you did before this trouble happened?
A. Yes, sir.

Tanksley's testimony is in the same vein. (Tr. 55-57).

It is further submitted that an examination of Boatwright's testimony plainly reveals that it is unworthy of belief.

Let us examine the testimony of this witness. Boatwright testified that on March 7, 1952, he and Tanksley went out to appellant's place of business for the first time (Tr. 21). He was dressed as a civilian on this trip as he was on all occasions in which he had any dealings with Baker or appellant (Tr. 41). Neither appellant nor Baker was present on this first visit of Boatwright and Tanksley to appellant's place of business.

A few days later Boatwright and Tanksley went again

to appellant's place of business (Tr. 21). Appellant was not present on this occasion either (Tr. 22).

WHY DID BOATWRIGHT AND TANKSLEY MAKE TWO TRIPS OUT TO APPELLANT'S PLACE OF BUSINESS?

Boatwright testified in this regard as follows: (Tr. 21)

"Q. Now, what was your reason for going to Mr. Williams' place?
A. Mr. Williams had sent word by Tanksley, told Tanksley he was interested in buying —

Mr. Caton:
I object, Your Honor —

A. — aircraft parts.

The Court:
Just a minute — you can't say it quite that way, you can't tell us what someone else said. You can state that you got a message to come see him.

Q. You got a message from Mr. Williams to come see him, is that correct?
A. Yes, sir."

Thus, Boatwright testified that he and Tanksley went out to appellant's place of business on March 7, 1952, and that appellant was not there on that occasion. He further testified that he and Tanksley again visited appellant's

shop a few days later and again appellant was not there. On this occasion, Boatwright stated that he left his telephone number with Baker to have appellant call him. (Tr. 22). Why did Boatwright and Tanksley go to all of this trouble to see appellant?

BOATWRIGHT TESTIFIED THAT THE REASON HE AND TANKSLEY WENT TO ALL THIS TROUBLE WAS THAT APPELLANT HAD SENT WORD TO TANKSLEY THAT HE WAS INTERESTED IN BUYING PARTS. THE RECORD AFFIRMATIVELY SHOWS THAT APPELLANT DID NOT EVEN MEET OR SPEAK TO TANKSLEY UNTIL AFTER THIS TRANSACTION WAS CONSUMMATED (Tr. 44-60). IT IS UNREASONABLE TO BELIEVE THAT APPELLANT WOULD SEND WORD TO SOMEONE HE HADN'T HEARD OF, DIDN'T KNOW, AND DIDN'T MEET UNTIL SOMETIME LATER.

Tanksley testified that he had no dealings of any kind when he went out to appellant's warehouse for the first time (Tr. 54).

He testified as follows:

"Q. When was the first time that you met Tom Baker?
A. The first time I went to the warehouse.

Q. Who were you looking for?
A. Mr. Williams.

Q. **Had you had any relationships with Williams?**
A. No." (Emphasis added)

Thus, Boatwright's excuse for making two trips to see appellant was clearly a figment of his imagination (which was very active during the trial).

Another characteristic of Boatwright's testimony which illustrates very vividly its lack of credibility is his ability to recollect on direct examination the exact time, date and places of certain events, but on cross examination to be able to recall these same events only generally.

On direct examination, he remembered March 7, 1952 as the date he and Tanksley went to appellant's establishment (Tr. 21). He recalled further that on March 13, 1952 he received a telephone call from appellant. (Tr. 22). He remembered that on that night he went to appellant's hotel room at 8:00 o'clock (Tr. 23).

On cross-examination, Boatwright was far less exact in his dates.

For example, when asked to give the first time he met Williams (appellant), he answered: (Tr. 29)

"A. Along in March."

The Court became impatient with Boatwright's sudden lack of memory on cross-examination and it stated: (Tr. 32)

"The Court:

Well, give him the date, that is what he wants to know—when was it delivered to Baker?

A. THE LATTER PART OF MARCH."
(Emphasis Added)

Thus, even though Boatwright could give the dates and places of other events, HE COULD NOT EVEN GIVE THE EXACT DATE THE PROPELLER WAS MISAPPROPRIATED AND DELIVERED TO BAKER.

Further, some of Boatwright's testimony is so unreasonable as to destroy any confidence in him.

Thus, although he and Tanksley were good friends, were arrested on July 1, 1952, were in the same brig together and had been out on bond together and were testifying together against appellant in January, 1953, when asked whether he and Tanksley ever discussed the case at all, testified as follows: (Tr. 41 and 42)

"Q. Have you and Tanksley discussed the facts in this case.
A. No, sir.

Q. You and Tanksley have not discussed it?
A. No, sir."

Such an answer is obviously an untruth and is characteristic of Boatwright. On the testimony of such a man, appellant's conviction should not be sustained.

Tanksley came closer to the truth in his testimony when he stated: (Tr. 59)

"Q. Have you discussed this case much with your buddy-friend Boatwright?
A. No.

Q. Have you discussed it at all?
A. We have discussed it and talked about it but not a lot."

Finally, it is to be remembered that Boatwright and Tanksley testified against both Baker and appellant. If anything, Boatwright and Tanksley had more dealings with Baker than with appellant. Baker was the one who met Boatwright and Baker at Milton and received the propeller from them. The jury acquitted Baker and convicted appellant. A READING OF THE RECORD IN THIS CASE WILL CONVINCE THIS HONORABLE COURT THAT IT IS IMPOSSIBLE FOR A REASONABLE PERSON TO DISBELIEVE BOATWRIGHT AND TANKSLEY AS TO BAKER AND ACQUIT HIM, AND BELIEVE THEM AS TO APPELLANT AND CONVICT HIM.

For the reasons stated hereinabove, counsel for appellant submits that the motions for directed verdict of not guilty (judgments of acquittal) should have been sustained at the end of the government's case and at the end of the entire case, and the Court of Appeals erred in holding the trial court to be correct in overruling said motion by appellant.

IV

The Court of Appeals erred in holding that the Trial Court properly denied Appellant's motion for a directed

verdict of acquittal as to Count 2 since the proof in this case proves, if anything, that the propeller was "embezzled" and not "stolen" as charged in the indictment.

In the Second Count of this Indictment, appellant was charged as follows: (Tr. 5)

> " Second Count.
>
> "That on or about March 15, 1952, in the Northern District of Florida, Walter Williams, alias Wallace Williams, alias Wally Williams, alias Jack M. McDaniels, alias Walter Marion Williams, alias Walter Williams, Sr. and Thomas Baker, alias Tom Baker, did unlawfully receive, conceal and retain with intent to convert to their own use and gain the following described property of the United States:
>
> "One (1) SNY airplane propeller, which said property had theretofore been STOLEN as they the said Walter Williams and Thomas Baker then and there well knew, the value of said property being more than One Hundred Dollars ($100.00) (18 USC 641). (Emphasis Added.)"

The statute under which appellant was charged in this case states:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the

> United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, KNOWING IT TO HAVE BEEN EMBEZZLED, STOLEN, PURLOINED OR CONVERTED ***"
> (Emphasis Added)

Appellant was charged with receiving, concealing and retaining with intent to convert to his own use one airplane propeller of the Government, which appellant well knew to have been STOLEN. Thus, it is a fundamental element of Count Two of the indictment in this case that the propeller must be STOLEN government property and the appellant must know that it has been STOLEN when he received it.

It is clear that the statute in the case at bar draws a distinction between property which is "stolen" and that which is "embezzled." The word "steal" was interpreted in the statute under the consideration (18 U.S.C.A.) by the Supreme Court of the United States in the case of *MORRISSETTE V. UNITED STATES,* 342 U.S. 246, 96 L. Ed. 288) when the Court quoted with approval the following definition of "steal":

> "To steal means to take away from one in lawful possession without right with the intention to keep wrongfully. *IRVING TRUST CO. V. LEFF,* 252

N.Y. 359, 364, 171 N.E. 569."

Further, the Court reviewed the history of the statute (Tit. 18 No. 641, USC) in footnote 28 of the opinion. The pertinent part of this opinion read as follows:

"28 The Reviser's Note to 18 USC No. 641 states that it is derived from 18 USC (1940 ed) Nos. 82, 87, 100, and 101 which, in turn, are from Rev. Stat. Nos. 5438 and 5439. We shall consider only the 1940 code sections and their interpretations. 18 USC (1940 ed) No. 82 reads:

"Whoever shall take and carry away or take for his use, or for the use of another, with intent to steal or purloin . . . any property of the United States . . . shall be punished as follows . . . "

"In *United States v. Anderson* (DC Cal) 45 F. Supp. 943, a prosecution for conspiracy to violate that section, District Judge Yankwich said:

"It has been before the courts in very few cases. But such courts as have had cases under it, including our own Ninth Circuit Court of Appeals, have held that the object of the section is to introduce the crime of larceny into the Federal Criminal Code.

"In *Franch v. Mass,* 9 Cir., 1939, 106 F. 2d 820, 821, we find these words: 'larceny of property of the United States is made a crime by 18 U.S.C. No. 82.'

"This means of course, that in interpreting the statute, we may apply the principles governing the common law crime of larceny, as interpreted by the courts of various states." 45 F. Supp. at 945.

"*United States v. Trinder* (DC Mont) 1 F. Supp. 659 was a prosecution of a group of boys, under No. 82, for "stealing" a government automobile. They had taken it for a joyride without permission, fully intending to return it when they were through. Their plans went awry when the auto came to grief against a telephone pole. In dismissing the complaint, the District Judge said:

"Upon principle and authority there was no stealing but merely trespass; secret borrowing. At common law and likewise by the federal statute (18 U.S.C. No. 82) adopting common law terms, stealing in general imports larceny; that is, felonious taking and intent to permanently deprive the owner of his property." 1 F. Supp. at 660."

Also, in the case of *HITE V. UNITED STATES*, 168 F. 2d 973 (CCA 10, 1948) on page 975, the court stated:

"The word 'steal' in a criminal statute ordinarily imports the common-law offense of larceny."

On the other hand, embezzlement is defined as follows:

"Embezzlement is established by proof that the property came unlawfully into a defendant's possession under circumstances which create a fiduci-

> ary relation between defendant and its owner, and that there was a breach of trust or a wrongful appropriation of the property to the defendant's use. *MOORE V. UNITED STATES*, 160 U.S. 268, 16 S. Ct. 294, 40 L. Ed. 422; *WEINHANDLER V. UNITED STATES*, 20 F. 2d 359."

Thus, counsel for appellant submits that property has been "stolen" within the meaning of this statute when there has been an unlawful taking, and that property has been "embezzled" when the taking is lawful but that the criminal intent to misappropriate the property comes into existence subsequent to the lawful taking.

Appellant contends that the government has utterly failed to prove that this property was "stolen" as charged in the indictment. If it proved anything, the government proved that the property in this case was "embezzled" and not "stolen."

The government relied on two witnesses to prove that this property was "stolen" — Boatwright and Tanksley.

Boatwright's testimony reveals that he did not obtain the propeller and was not even present when it was obtained. All that he could testify to was that Tanksley informed him that he (Tanksley) had "stolen" it. On page 25 of the transcript, Boatwright testified as follows:

"Q. Did either you or Tanksley ever get the propeller.
A. Tanksley got it for him.

Q. Do you know of your own knowledge where the propeller was received from?
A. Yes, sir.

Q. Where?
A. Naval Air Station, main side.

Q. Where was the propeller delivered?
A. Tanksley dropped it off in the woods and was delivered to Mr. Baker."

On Page 27, Boatwright testified:

"Q. Now, you didn't yourself convey the airplane propeller to the wooded area?
A. No, sir.

Q. That was done by Tanksley?
A. Yes, sir."

On Page 28, he stated:

"A. No, sir, I didn't help get it, Tanksley got the propeller, I didn't. I helped put it in Baker's car."

On Page 32, Boatwright testified:

"A. Actually I didn't steal it myself. I made the deal and another fellow stole it."

Further, on Page 33 he testified:

"A. I don't know where it was located — where the man picked up from, what building, or anything like that.

Q. You don't know where he got it?
A. No, sir, I don't.

Q. Who got it?
A. Tanksley.

Q. Some where at the air station?
A. Yes, sir.

Q. Do you know whether it was stolen or not?
A. Yes, it was stolen.

Q. How do you know it was stolen?
A. Tanksley said it was stolen."

And, on Page 39, Boatwright corroborates Tanksley's later testimony which shows the propeller to have been "embezzled" rather than "stolen" when he stated:

"Q. You state that you have no knowledge at all of the actual theft of this propeller that was subsequently delivered to Baker?
A. I got a receipt for it which Tanksley had signed for it at mainside — he gave me the receipt and I put it on file. He said the propeller was out in the woods.

Q. Tanksley brought you a receipt?
A. Yes, sir.

Q. Where did this receipt come from?
A. Mainside.

Q. Had they checked it out to him?
A. Yes, sir.

Q. They had checked it out to him and he brought it on out to where?
A. Whiting Field — you mean the receipt of the propeller?

Q. Both.
A. He brought the receipt out to Whiting Field.

Q. He brought the receipt out to Whiting Field?
A. Yes, sir.

Q. So he had permission to take the propeller out of the air station?
A. That is right.

Q. Did he take the propeller in to Whiting Field?
A. No, he didn't."

Tanksley's testimony clearly shows that the material was "embezzled" and not "Stolen."

On Page 46, Tanksley testified as follows:

"Q. What was your purpose in getting that propeller at that time?
A. **To be used in the squadron that I was working in."**

Finally, on Page 51, Tanksley testified as follows:

"The Court:

Was it government property when you took it?

A. Yes, sir.

The Court:

And you didn't buy it?

A. No, sir.

The Court:

You came into possession of it illegally?

A. Yes, sir.

The Court:

That is you converted it from legal possession to an illegal possession?

A. Yes, sir.

Mr. Eggart (Continuing):

Q. In other words, you got it out of there by requisition and instead of taking it where you should have you took it out to this wooded area to sell it?

A. Yes, sir.

(That is all.)

Cross Examination.

"By Mr. Caton:

Q. You drive a truck for the navy do you?

A. I did at that time.

Q. That was your main job to pick up various parts for the navy with these requisitions?
A. Yes.

Q. This was a normal form of requisition so you could get property from the navy?
A. Yes.

Q. Then you take it and deliver it — you have custody of the property until you deliver it?
A. Yes.

Q. That is the same type of requisition you used in this instance?
A. Yes.

Q. Did they look at the requisition when you went through the gate in getting out of the navy air station?
A. We have a property pass to get out of the gate.

Q. Not necessary to —
A. It is not necessary to have a stub, no.

Q. Do the MP's look at the material you have?
A. No, they don't.

Q. It is not necessary for them too look at it, is that the situation?
A. Yes."

Thus, it is submitted by counsel for appellant that the government has utterly failed to prove that the propeller was "stolen" within the meaning of the statute. If the government has proved anything in this case, it has only proved that the propeller in Count Two was "embezzled." Therefore, it is contended that the motion for a directed verdict of not guilty (motion for judgment of acquittal) made at the end of the case should have been maintained as to Count Two and withdrawn from consideration by the jury and the Court of Appeals was in error in holding adverse to such a contention.

V.

The Court of Appeals erred in ignoring petitioner's argument that the Trial Court committed prejudicial error patent on the face of the record by adopting a very paternal attitude on the part of the Government witnesses, Boatwright and Tanksley, by continually referring to them as "the sailor boys."

For its conviction of Appellant in the instant case, the government relied almost solely on the testimony of the self-confessed accomplices, Boatwright and Tanksley. During the trial of the case, Boatwright and Tanksley testified in great detail as to the formation of the conspiracy involving appellant; that appellant and Baker knew they (Boatwright and Tanksley) were enlisted men in the United States Navy and that appellant contacted Boatwright via telephone at Whiting Field, Naval Air Station, Pensacola, Florida relative to the conspiracy to steal the propeller.

Appellant, on the other hand, denied very emphatically that he was implicated in a conspiracy with Boatwright and Tanksley, denied that he knew that Boatwright and Tanksley were in the Navy stationed at Whiting Field, denied that he contacted Boatwright at Whiting Field but stated that Boatwright had contacted him and informed him that he (Boatwright) was engaged in the aircraft parts business in Miami, Florida.

Thus, the question presented to the jury was to determine the credibility of the witnesses, Boatwright and Tanksley, for the Government as opposed to the testimony of defendant appellant and Baker. Since the jury had to make a decision as to which set of witnesses to believe, it was extremely prejudicial for the trial judge to REFER TO THE SELF-CONFESSED THIEVES AND ACCOMPLICES, BOATWRIGHT AND TANKSLEY, EIGHT TIMES DURING THE COURSE OF THE CHARGE TO THE JURY AS "THE SAILOR BOYS." This paternal attitude of the Court toward Boatwright and Tanksley was extremely prejudicial to appellant in the eyes of the jury, and prevented a fair and impartial determination of appellant's guilt by the jury. This error is patent on the face of the record and may be noticed and corrected by this Honorable Court although it was not objected to by appellant's counsel during the trial of the case. Rule 52 (b), Federal Rules of Criminal Procedure; *Rose v. U. S.*, 128 F. 2d 622; *Gomila v. U. S.*, supra. The court of Appeals in the instant case ignored the argument by appellant. It is submitted that it erred in so doing.

Petitioner most respectfully submits that this application should be granted to the end that the conviction of Ap-

pellant in the District Court, and the affirmance of said conviction by the Court of Appeals for the Fifth Circuit should be set aside and that the indictment against your petitioner should be dismissed herein, or the cause reversed for a new trial.

Respectfully submitted,

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The undersigned hereby certifies that he has served a copy of the foregoing brief on the Solicitor General of the Department of Justice at Washington, D. C., this _____ day of _____, 1954.

Attorney for Petitioner